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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. .....

COUNTY OF LOS ANGELES, a body politic and corporate,
Appellant,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation,
Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Preliminary Statement

The appellant County of Los Angeles brought an action against the appellee telephone corporation to compel it to account for the value of the use of the County streets under general laws which authorize the

County to grant franchises for all lawful purposes[1] and providing that in the granting of such franchises the holders thereof must pay (in addition to the amount bid for the franchise) two per cent (2%) of the gross receipts resulting from the use of the franchise.[2]

As a defense the telephone corporation invoked section 536 of the Civil Code,[3] providing, as construed by California courts, that telephone and telegraph cor-

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[1]Said statute as presently codified is section 26001 Government Code of the State of California, reading as follows: "The board may grant franchises along and over the public roads and highways for all lawful purposes, upon such terms, conditions, and restrictions as in its judgment are necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public.

"Any general law applicable to the granting of franchises by municipal corporations and counties throughout the state shall be complied with in the granting of any franchise by the board of supervisors."

The predecessors of section 26001 Government Code are subdivision 35 of section 25 of the County Government Act of 1897, Stats. of 1897, page 452, and section 4041.9 of the Political Code of the State of California.

[2]The Franchise Sales Law of the State of California, Stats. 1905, page 777, as amended, (commonly known as the Broughton Act. Deering Act 2720), reading in part as follows: "Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas-pipes for the purpose of carrying gas for light, heat or power, to erect poles or wires for transmitting electricity for light, heat or power, along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise. The grantor may, however, in such franchise impose such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interest.

"Section 2. . . .

"Section 3. . . . that the successful bidder and his assigns must, during the life of said franchise, pay to the county or municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. . . . "

---

[3]Section 536 of California Civil Code: "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

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porations (and no other persons or corporations) are offered a free franchise which when accepted by the user constitutes a contract and a property right.

It should be noted that section 536 was no part of County's case and that it was invoked by a party in the "favored" class.

The County objected to such defense on several State grounds of constitutionality and statutory construction and finally upon the ground that said section 536 Civil Code violated the first section of the 14th Amendment of the Federal Constitution in denying equal protection of the laws to all persons, associations and corporations other than telephone or telegraph corporations. Not only is the free franchise withheld from natural persons engaging in the telephone business but it is withheld from corporations engaging in other public utility businesses such as electric light and power companies, gas companies and water companies. It boldly creates one rule for telephone and telegraph corporations and a different and contrary rule for all others. It is comparable to the situation described by this Honorable Court in *Frost v. Corporation Commission*, 278 U. S. 515, at 524, 73 L. Ed. 483, as follows:

> "Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, boldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits."

The County relied upon the latter case and also upon *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389, 72 L. Ed. 927.

We recognized that under many circumstances the classification of corporations is proper but only where there is some relationship between the corporation form of doing business and the subject matter of the legislation. Under the authority of the cases just cited it was and is our position that it is unconstitutional to give a business advantage to telephone and telegraph corporations, and such corporations alone, merely because they are telephone and telegraph corporations and where it is not an integral part of a general statute for the regulation of an industry for the public good.

In the opening statement contained in "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" appellee apparently suggests that this Federal constitutional objection was raised too late. However, it was raised before the case was first decided by the State Supreme Court and the opinion of that Court discusses the question at length both in the majority and dissenting opinion and decides such question. (See opinion in Appendix to this Brief.) Consequently under the decisions of this Honorable Court the question was properly raised.

Mallinckrodt Chemical Works v. Missouri ex rel. Jones, 238 U. S. 41, 59 L. Ed. 1192;

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Chambers v. Baltimore & O. R. Co., 207 U. S. 142, 52 L. Ed. 143;

Sully v. American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072;

Meidreich v. Lauenstein, 232 U. S. 236, 58 L. Ed. 584.

We are now confronted with a motion to dismiss on the following grounds:

1. The County of Los Angeles being a political subdivision of the State has no standing to challenge the validity of section 536 of the Civil Code, which was raised as a defense by the telephone corporation.

2. The County is not a member of the class discriminated against and thus cannot assail the validity of the statute raised by the telephone corporation as a defense.

3. The County has not proved an actual injury and therefore the constitutionality of section 536 must be presumed.

4. The Federal question raised by the County, to wit, that Civil Code section 536 is a nullity, is unsubstantial.

5. The decision of the Supreme Court of the State of California rests upon adequate non-federal grounds.

We shall consider these grounds in the same order.

Point I.

It Is Not the Theory of Our Case That the County Is Within the Protection of the 14th Amendment

We are seeking neither to have overruled nor to have distinguished the decisions holding that a political subdivision is not protected as against the State by the provisions of the 14th Amendment. We are not contending that there has been any discrimination against the County of Los Angeles. We are contending that section 536 of the Civil Code of California does discriminate against all persons, partnerships and associations doing a telephone business other than telephone and telegraph corporations and also that said section discriminates against all corporations, which are required to obtain franchises, other than telephone and telegraph corporations. Such persons, partnerships, associations and corporations are protected by the first section of the 14th Amendment and such discrimination has rendered the section unconstitutional and a nullity.

We fully recognize that our lawsuit must stand or fall depending upon whether or not under the facts of this case the County is in a position to assert the invalidity of the statute because it violates the constitutional rights of others. That, rather than appellee's first ground, is the crucial issue which we are prepared to meet and will meet in our next point.

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Point II.

Recognizing the General and Long Established Rule That a Person in the Favored Class May Not Assert Discrimination Against Others to Defeat a Statute, Our Position Is That the County Is Not Within the Scope of That Rule Under the Circumstances of This Case and That in Any Event It Is Within a Recognized Exception Thereto.

The general rule is usually phrased broadly as stated by appellee, to wit, that

> "No one can assail the validity of a statute on the ground that it impairs the constitutional rights of others."

However, it is significant that in the cases cited by appellee and in most cases involving the general rule it has been a person in the "favored" class who has attempted to invoke the protection of the Constitution. The typical situation is one in which a statute imposes a burden upon many but an even greater burden upon a few and hence one of the many, even though favored, seeks to upset the statute to avoid such burden.

Many sound reasons suggest themselves why such a favored person should not be heard to champion the cause of the remaining few. For example, the many may constitute by themselves a complete and valid class and hence striking the portion of the statute relating to the few still leaves a valid statute embracing a complete class of persons properly subject to its burdens.

For example also, if, as and when the discriminated few appear before the Court to state their grievance the Court may by judicial construction limit the burden on the few to that placed upon the many.

However, the present situation is unusual in several respects:

First. The favored group in the present instance are truly favored through an outright gift of public property, which gift our State Court has held is not prohibited by our State Constitution, and it is not the usual case where the favored group is favored merely because a lesser burden is imposed thereon.

Second. In the usual case the favored group are attempting *to attack the statute* despite the favoritism, whereas, here it is the favored group who are attempting *to assert the statute* as an affirmative defense to a lawsuit. If the rule applies here it applies not as a limitation on the favored group (the usual situation) but results in giving such favored group the affirmative right to obtain benefits from an unconstitutional law.

Third. The favored group do not constitute a complete and valid classification (see our Point IV) and hence it is impossible to segregate the favored group from the discriminated group and hold that the statute is valid as to the former whatever may be the ultimate decision with respect to the latter.

Fourth. As previously indicated, one of the justifications for the general rule is that if the discriminated

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class were actually before the Court the Court might by judicial construction so limit the statute that there would be no excess burden. Because of the peculiar nature of the present statute that is not possible here. The statute does not affirmatively place a burden upon the discriminated class but simply refrains from mentioning any persons other than telephone and telegraph corporations in giving the benefit of a free franchise. Since it is impossible by judicial construction to add something to a statute (as distinguished from striking out or limiting an invalid portion of a statute) it is impossible in this situation to equalize the rights of all parties by judicial construction even if the discriminated class could state a cause of action and get before a court.

Fifth. The discriminated group in the present instance would not obtain the benefits of the favored class even if the statute were struck down. Whether the statute be valid or invalid such group obtains no gift of a free franchise and consequently there is no way that the discriminated group may state a cause of action, obtain a judicial decision and correct the evil.

Sixth. Because the discriminated group are not in a position to state a cause of action against the statute it follows that unless other parties affected by the legislation (as distinguished from those affected by the discrimination) are permitted to raise the Federal question no one can raise the point and the favored group not only may enjoy the fruits of an unconstitutional statute but may affirmatively assert the uncon-

stitutional statute and may use the courts (as they have in this case) to protect them in such unconstitutional privileges. Such an application of the rule under the situation of this case is to place the favored group not only above the Constitution but also above the courts, the courts being powerless to prevent even an affirmative reliance upon the unconstitutional law.

Seventh. The County is not in the favored class (the usual situation where the rule is involved) but is in a class vitally affected by the legislation to its financial detriment, it not being able to receive substantial franchise payments from this favored group.

All of the foregoing suggests that, since the rule is obviously not intended to absolutely prevent judicial review of a constitutional question but merely to assure that it be presented in a proper manner by proper parties, the rule itself should cease when the reason for the rule ceases. We believe that our more limited statement of the rule, to wit, that those in the favored class may not assert the rights of the discriminated class, more nearly conforms to its true intent. The County, not being in the favored class but being in a class adversely affected by the legislation, should therefore not be barred from raising the constitutional question.

Whether we say that the rule itself is limited or whether we accept the broad statement of the rule and recognize necessary exceptions thereto, the result is the same. The California courts in approaching the prob-

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lem have stated the rule broadly but have recognized an exception which covers the present case. The United States Supreme Court has held that under certain circumstances the rule itself does not bar a person who is adversely affected by the legislation although not in the discriminated class. We shall now consider such rules and decisions.

Under the decisions of the State of California the County was a proper party to present this issue in the State Court. California recognizes an exception to the general rule and permits one adversely affected by the legislation to raise the point when it is impossible for one in the discriminated class to raise it.

> *Quong Ham Wah Co. v. Industrial Acc. Com.*, 184 Cal. 26;
>
> *Pac. Indemnity Co. v. Myers*, 211 Cal. 635;
>
> *Van Camp Seafood Co., Inc., v. Newbert*, 76 Cal. App. 445.

This exception is described in *11 Am. Jur.*, page 760, under the subject of Constitutional Law, section 114, as follows:

> "The general rule that a statute purporting to make unconstitutional discrimination between persons or classes of persons cannot be assailed on the ground of unconstitutionality by a person not belonging to the class discriminated against, is subject to well-defined exceptions where contingencies culminate in a grievance against persons not originally within the contemplation of the statute. Un-

> der this view it has been held in one jurisdiction that where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise a constitutional question, then any person affected by the application of the statute can urge its unconstitutionality, for the right to attack a statute void for discrimination is not considered to be confined to persons injured by the discrimination, but under some circumstances may be available to those injured by the legislation, even though they are not members of the unfavored class under the statute."

This Honorable Court has likewise permitted a person not in the discriminated class to raise the point where circumstances made it necessary for him to do so to protect his property rights.

Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149. In that case it was stated at page 72 as follows:

> "The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved

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and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of the law or ordinance, he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

We submit that the unusual facts presented by the case at bar likewise justify either invoking such an exception or justify limiting the general rule itself so that it does not embrace those situations where the reason for the rule has ceased. Otherwise we submit that the rule as sought to be applied by appellee would forever prevent any decision upon this constitutional question (since the persons in the discriminated class can state no cause of action) and would forever result in the courts' protecting them in the enjoyment of an unconstitutional privilege.

Point III.

The Discrimination Is Not Conjectural and Hypothetical and the Injury Is Substantial

The appellee telephone corporation asserts that there is nothing in the record to show any injury whatsoever and hence that any injury upon which we might seek to rely is conjectural and hypothetical.

That there is injury to appellant is evident from the fact that appellee is using all of the roads of the County without charge, whereas but for section 536 Civil Code of California the appellant County would collect 2% of the gross receipts under the Franchise Sales Law (Stats. 1905, page 777, as amended, commonly known as the Broughton Act.) Because of section 536 Civil Code of the State of California telephone and telegraph corporations are permitted to use without charge not only the highways of this County but the highways in every county in the State of California. Such highways although provided at the expense of the taxpayers are being diverted to the use of telephone corporations, their stockholders and subscribers. But for this statute the taxpayers of the various counties would be enabled to obtain a substantial reimbursement of their investment. Because of this statute and because of this lost franchise revenue the taxpayers must be subjected to a correspondingly increased tax burden. The damage, therefore, is substantial and continuing and, unless the statute is declared a nullity, is perpetual.

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That there is injury to the discriminated class is shown by the fact that they must pay such 2% of the gross receipts (an obviously substantial amount), whereas telephone and telegraph corporations do not.

What appellee apparently has reference to is that the record does not show how many persons there are so discriminated against. Appellee therefore assumes that for the purpose of this case there are no persons in the discriminated class.

However, it is well established that in passing upon problems of discrimination the Court may consider those things which may be judicially noticed. In *Weaver v. Palmer Bros.*, 270 U. S. 402, 70 L. Ed. 654, this Court said, at page 410:

> "Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 65; 56 L. Ed. 350, 352; 32 Supreme Court Rep. 192), or by facts established by evidence."

In the case of *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, (involving the emergency Mortgage Moratorium Law of 1933) the Court took judicial notice of the general facts concerning the economic status of the nation in answer to an attack under the due process and equal protection clauses.

In applying these principles to the case at bar it is matter of common knowledge and hence may be judicially noticed that public utility corporations such as electric lighting and power companies, water compa-

nies, gas companies and other companies rendering service to the public all use the public streets for the purpose of laying and maintaining their lines and distributing their products and services. Such public utilities whether incorporated or not are required to pay 2% of the gross annual receipts arising from the use, occupation or possession of such franchises pursuant to the Franchise Sales Law (Stats. 1905, page 777, as amended, commonly known as the Broughton Act). Likewise, all natural persons and partnerships who are operating telephone and telegraph lines (such as unincorporated mutual telephone companies and business concerns running telegraph and telephone lines between their main offices and branch offices) must obtain franchises and pay for such privilege. There is therefore a substantial injury to a substantial class.

Appellee under this point asserts not only that we must prove actual and not hypothetical injury but also asserts that we must negative every conceivable basis which might support the legislative classification. Whether or not the classification is proper is the subject matter of our next point and will be discussed there. For the present we merely wish to point out that the rule is not as harsh as stated by appellee and it is not always assumed in the absence of proof that reasons exist for a classification made by the legislature. As was stated by this Court in *Colgate v. Harvey*, 296 U. S. 404, at 425, 80 L. Ed. 299:

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> "To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only on surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose."

In our next point we shall consider the problem whether or not the classification contained in section 536 of the Civil Code of the State of California is related to the purpose or object of the legislation or whether it is simply an arbitrary selection of a particular type of corporation for the sole purpose of granting such favored corporation a special benefit.

Point IV.

The Federal Question Is Substantial. Appellant County's Position Is in Accord With the Decisions of This Court Whereas the Appellee's Position and the Holding of the State Court Is in Accord Only With the Dissenting Opinion in Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483. The Judgment Appealed From Fails to Give Due Consideration to the Requirement That There Be a Relationship Between the Classification and the Subject Matter of the Legislation.

At no time in this lawsuit have we ever questioned the basic premise of appellee that it is entirely proper to classify corporations for many purposes and in many types of statutes.

What we have asserted is that such classification like any classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Frost v. Corporation Commission,* 278 U. S. 515, at 524, 73 L. Ed. 483.

That essential "relation to the object of the legislation" has been substantially ignored by appellee, by the majority opinion of our State Court in the present case, and in the dissenting opinion in *Frost v. Corporation Commission,* 278 U. S. 515, 73 L. Ed. 483. And now appellee (although stating that the State Court distinguished the Frost case) boldly asserts on page 10 of its present motion:

> "The dissenting opinion of Justice Brandeis in that case, concurred in by Justice Holmes and Stone, is undoubtedly, as the cases above show, the established rule of this Court."

By that statement appellee has now very frankly defined the issue presently before this Court both with respect to this motion to dismiss and with respect to the merits. Appellee concedes and indeed asserts that it stands on the dissenting opinion in the Frost case and that such dissenting opinion is the established rule. We assert that the majority opinion in that case is the law.

With respect to the motion to dismiss, the mere fact that appellee finds it necessary to rely upon a dissenting opinion of this Court and in effect to ask this Court to overrule the case demonstrates that the Federal

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question is substantial, and that is true whether the decision sought to be overruled be right or wrong.

With respect to the merits, the fact that the majority opinion in the Frost case does give effect to the essential requirement that the classification must bear a "relation to the object of the legislation" whereas the dissenting opinion does not give proper consideration to that factor we believe supports our position completely.

The other cases cited by appellee are not inconsistent with the majority decision in the Frost case and are not in accord with the dissent. They upheld the classification of corporations and the Frost case did not but the essential difference between the two lines of cases is that in the cases upholding the classification there was the necessary relationship between classification and subject matter of the legislation whereas in cases like the Frost case there was not. Only two of the cases cited by appellee are subsequent to the decision in the Frost case. The other prior cases obviously did not overrule or modify the established rule of that case. Neither of the two subsequent cases (*Lawrence v. State Tax Commission,* 286 U. S. 276, 76 L. Ed. 1102; *Phillips Petroleum Co. v. Jenkins,* 297 U. S. 629, 80 L. Ed. 943) purport to modify or overrule the Frost case. In fact, the first of those cases, *Lawrence v. State Tax Commission,* 286 U. S. 276, at pages 283 to 284, spent considerable time recognizing the rule and demonstrating that a relationship did exist in that case between the classification and the subject matter of the

legislation. It is an income tax case. The supposed discrimination was in failing to tax corporate income on out of State business but the Court pointed out the State policy embodied in the general statute to avoid duplication of tax on corporate income and stockholders' dividends, and since the latter was taxed it was logical and consistent and produced substantial equality to exempt the former. There was a relationship between the corporate form of doing business and the object of the legislation which not only substantially eliminated discrimination but which made necessary and hence justified the classification. Because of this relationship this Honorable Court expressly distinguished (and did not overrule) *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389, 72 L. Ed. 927, the other case upon which we rely, and which arrived at the same conclusion as the Frost case. We thus see no justification in the suggestion made by appellee that the cases upon which it relies show that the dissenting opinion in the Frost case "is undoubtedly, as the cases above cited show, the established rule of this Court."

We submit that the holdings of this Honorable Court are consistent. None of them holds that classification is always proper. They require the establishment of relationship between class and subject matter. The end results differ depending upon whether that relationship exists. Where such a relationship exists the classification is upheld. In *Frost v. Corporation Commission,* 278 U. S. 515, 73 L. Ed. 483, it did not exist and the statute was struck down. Likewise, in *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389,

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72 L. Ed. 927, the relationship did not exist and the statute was struck down.

An examination of the reasons given by this Honorable Court for its conclusions in the latter two cases will demonstrate that it was not applying different rules but the same rules to different facts. In *Frost v. Corporation Commission,* 278 U. S. 515, 73 L. Ed. 483, the Court said, at page 524:

> "The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415, 64 L. Ed. 989, 990, 40 Sup. Ct. Rep. 560; Air-way Electric Appliance Corp. v. Day, 266 U. S. 71, 85, 69 L. Ed. 169, 177, 45 Sup. Ct. Rep. 12; Schlesinger v. Wisconsin, 270 U. S. 230, 240, 70 L. Ed. 557, 564, 43 A. L. R. 1224, 46 Sup. Ct. Rep. 260. That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . .
>
> "Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here

construed and applied, boldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, this Court said, at page 402:

" . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, supra. No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment."

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In one case the statute attempted to give a business advantage and in the other case to impose a burden upon certain types of corporations merely because they were such corporations. They were not statutes which required different treatment of corporations because of inherent differences in that form of doing business or which were enacted to promote some public purpose related to the police power wherein and as an incident thereto it became desirable to limit the conduct of certain functions to certain State-regulated corporations.

Precisely the same thing is true here. Section 536 Code of Civil Procedure of the State of California does not purport to regulate the telephone business by limiting the engagement therein to corporations. All persons are permitted to engage in the telephone business and all are subject to precisely the same regulations. So far as section 536 Civil Code is concerned there is no regulation of the telephone industry whatsoever. All that the section does is to grant a subsidy to all those who happen to be telephone or telegraph corporations. Other persons engaged in the telephone or telegraph business must obtain the usual franchise and pay the usual substantial fees. Other corporations engaged in other utility businesses must obtain the usual franchises and pay the usual fees. There is no rational relationship between the privilege granted to telephone and telegraph corporations and the subject matter of the legislation. It is the situation which was before this Honorable Court in the Frost case. In the Frost case the discriminated class had to obtain a certificate of public convenience and necessity. Here

the discriminated class must obtain franchises under competitive bidding and in addition must pay 2% of their gross receipts.

We rely upon the Frost case.

Appellee relies upon the dissenting opinion in the Frost case and says that it is the established rule of this Court.

We submit that that presents a substantial Federal question sufficient at least to withstand the motion to dismiss and in our opinion sufficient to require the reversal of this case when it is considered on the merits.

Point V.

The Decision May Not Be Rested on Non-Federal Grounds

It is quite true that the State Court considered several State grounds of constitutionality and statutory construction and decided them against the appellant. However, it is the adverse decision upon such grounds which makes the Federal ground material. That is to say, if the State Court had decided that section 536 Civil Code of the State of California violated the State Constitution or had been repealed or had not granted a franchise to telephone corporations it would have been unnecessary to pass upon the Federal question. Having decided that the section was otherwise valid it was necessary to and the State Supreme Court did pass upon whether the section violated the 14th Amendment.

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There was no independent State ground of decision passed upon by the State Supreme Court which made the decision on the Federal ground unnecessary. Appellee asserts that there were two, (1) rule of property, and (2) estoppel.

With respect to the rule of property there is a two-fold answer:

First, the State Supreme Court did not rule that appellant was barred by a rule of property, but referred to one of the arguments "as something akin to a rule of property."

Second, such argument had reference to unconstitutionality under the State Constitution. It is now immaterial whether the statute does not violate our State Constitution because of prior decisions ("something akin to a rule of property") or because of the present decision of the State Supreme Court. It is because the section does not violate the State Constitution (either because of prior decisions or otherwise) that it becomes necessary to consider the Federal constitutional question. The State Court decision cannot be construed as holding that appellee was protected by a prior interpretation of the Federal Constitution, which prior interpretation constituted a rule of property. Section 536 Civil Code of the State of California had never before been challenged under the 14th Amendment in the Supreme Court of the United States or in the Supreme Court of the State of California.

With respect to estoppel appellee does not even contend in its motion to dismiss or affirm that the State Supreme Court rested its decision upon any such ground but merely asserts that the State Supreme Court in its opinion "recited the facts" considered by the trial court with reference to this defense.

It is well established that this Honorable Court will not "refuse jurisdiction because the State Court might have based its decision, consistently with the record upon the independent and adequate non-federal ground." *Indiana ex rel. Anderson v. Brand,* 303 U. S. 95, at 98, 82 L. Ed. 685.

With reference to both asserted independent State grounds of decision not only did the State Supreme Court not rest its decision upon any such grounds in the body of its opinion but we have that Court's own statement of what was before it and what it decided. The third paragraph of the Court's opinion reads as follows:

> "The questions to be decided are: First, what is the effect of section 536? Second, was section 536 repealed by the Broughton Act? Third, if section 536 is construed as granting a franchise to defendant, it is unconstitutional (a) as being a gift in violation of sections 22 and 31 of article IV of the California Constitution or (b) as denying equal protection of the laws and constituting an invalid grant of special privileges in violation of the 14th Amendment to the Federal Constitution and sections 11 and 21 of article I and section 25 of article IV of the California Constitution."

We submit that the State grounds actually passed upon are not indeperdent grounds of decision making it unnecessary to pass upon the Federal question, but upon the contrary, it is because those grounds were decided adversely to appellant and the statute was thus subsisting and valid under our State Constitution that it became necessary to decide whether or not the statute was nevertheless invalid because it violated the 14th Amendment of the Federal Constitution.

Conclusion

We respectfully submit that the motion to dismiss or affirm should be denied. If this case is not determined on the merits, a statute which gives telephone and telegraph corporations a special privelege will be perpetuated at the taxpayers' expense. It is a most important public question affecting the revenue of all the counties of this State.

Respectfully submitted,

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and
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APPENDIX

FINAL OPINION, AS MODIFIED ON REHEARING, IN THE SUPREME COURT OF THE STATE OF CALIFORNIA EN BANC

THE COUNTY OF LOS ANGELES, a body politic and corporate, Appellant, vs. SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation, Respondent.	)	FILED: L. A. No. 19311

GIBSON, C. J.—By this action for an injunction, plaintiff county is seeking to compel defendant telephone company to obtain a county franchise and to pay for the privilege of maintaining its lines and poles on streets and highways outside of incorporated areas. Defendant claims it was granted this privilege by section 536 of the Civil Code as amended in 1905, and that it is not required to obtain a franchise from the county. The trial court determined that defendant had a valid franchise, from the state, and denied the injunction. The county has appealed from the judgment.

In the years 1903-1905, the county issued five franchises for telephone lines, and these were there-

after conveyed to the defendant telephone company. Three of the franchises terminated before this action was commenced, and a fourth expired before the trial. The fifth franchise by its terms is still in effect, but the area which it covers was expressly excluded from this controversy by the complaint. Only one of the franchises required the payment of a percentage of the gross receipts derived from the use of the privilege, and the company made the payments, as provided, until expiration of the period specified therein. The company and its predecessors, at least since 1909, have specifically relied on section 536 for their authority when applying for permits to locate or change poles or lines on the highway. Further, from 1905 until about the time of the filing of the complaint, except for six years, the county assessed and levied property taxes on the franchise claimed by defendant and its predecessors under the section.

The questions to be decided are: First, what is the effect of section 536? Second, was section 536 repealed by the Broughton Act? Third, if section 536 is construed as granting a franchise to defendant, it is unconstitutional (a) as being a gift in violation of sections 22 and 31 of article IV of the California Constitution or (b) as denying equal protection of the laws and constituting an invalid grant of special privileges in violation of the 14th Amendment to the federal Constitution and sections 11 and 21 of article I and section 25 of article IV of the California Constitution.

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(1) Section 536 was originally enacted at the time of the adoption of the codes in 1872, but similar provisions had existed for many years prior thereto. (See Stats. 1850, p. 369; Stats. 1857, p. 171). When first enacted the section applied only to telegraph corporations. It made no mention of *telephone* companies, and it did not grant any rights to such companies prior to 1905, when the section was repealed and reenacted to apply to both telegraph and telephone corporations. (See *Sunset Tel. & Tel. Co. v. Pasadena,* 161 Cal. 265, 118 P. 796.) As applied to *telegraph* companies, it has been held that section 536, as it existed prior to 1905, was effectual to grant a state franchise, and that the use of the highways, and the maintenance and operation of the telegraph system, constituted an acceptance of the provisions of the statute and resulted in a contract between the company and the state which was secured by the federal Constitution against impairment by subsequent state legislation. (See *Western Union Tel. Co. v. Hopkins,* 160 Cal. 744, 87 P. 1023; *Postal Tel. Cable Co. v. Los Angeles,* 160 Cal. 129, 116 P. 566; *Sunset Tel. & Tel. Co. v. Pomona,* 172 F. 829, 837; *Postal Tel. Cable Co. v. Railroad Com.,* 200 Cal. 463, 254 P. 258).

The purpose of the change in 1905 was to add *telephone corporations* to the section, and, except for this extension, there is nothing in the amendment to indicate any intention to alter the effect and operation of the statute. (See *City of Salinas v. Pacific Tel. & Tel. Co.,* 72 Cal. App. 2d 494, 497, 164 P. 2d 905).

In view of the construction given to this section as it existed prior to 1905, and the absence of other changes, it must be held that the intention was to offer the grant of a franchise to telephone as well as telegraph companies upon acceptance by the construction and operation of communication facilities.

(2) A question has arisen, however, as to whether section 536 was repealed by the Broughton Act, which was adopted at the same session at which section 536 was amended. The act does not contain any provision expressly repealing that section, and it was not repealed by implication unless the statutes are so repugnant they cannot stand together. The Legislature was considering the statutes at the same time and must have intended to give effect to both. In *County of Inyo v. Hess,* 53 Cal. App. 415, 200 P. 373, it was held that section 536 was not repealed by the Broughton Act but that the statutes could operate in separate fields. The court said at page 425 "that under and by virtue of the provisions of section 536 of the Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and unrestricted by the provisions of the Broughton Act . . ." The court also declared that section 536 was intended as a legislative grant limited in operation to telegraph and telephone *corporations,* as distinguished from *individuals.* This construction is supported by the specific terms of the section which refers only to "telegraph or telephone corporations."

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The Broughton Act, unlike section 536, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates an intent to limit and restrict the powers which may have been granted under other laws by specifying the procedure which must be followed and the conditions which must be imposed in the granting of any franchise by subordinate legislative bodies. The court stated in *Oro Electric Corp. v. Railroad Com.*, 169 Cal. 466, at pages 482-483, (147 P. 118), that "this act merely places restrictions upon the granting of franchises, where the power to grant such franchises exists otherwise. As was said in *Sunset Tel. & Tel. Co. v. Pasadena,* 161 Cal. 265, 272, (116 P. 796), the 'whole purpose' of the act 'was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant.' The act does not authorize any board or council to grant a franchise." (See also *McGinnis v. Mayor and Common Council,* 153 Cal. 711, 713-714, 96 P. 367; *City of San Diego v. Kerckhoff,* 49 Cal. App. 473, 482 (193 P. 801). Since the Broughton Act is thus limited in operation to those franchises which subordinate legislative bodies are authorized to grant under other laws, it cannot be construed as applicable to statutory franchises which are not granted by such bodies but which, as in the case of the franchise involved here, are granted directly by the legislature. The two statutes

were enacted for separate purposes and occupy separate fields, and both can be given effect. There is, therefore, no such repugnance between the acts as would require a determination that there was any implied repeal. Accordingly, defendant is entitled to use the streets and highways in unincorporated areas of the county, by reason of its franchise under section 536, unless that section, as claimed, is unconstitutional.

The county contends that the Legislature is prohibited by sections 22 and 31 of article IV of the California Constitution from granting a free franchise and that since no compensation is required to be paid for the rights acquired under section 536, the statute is unconstitutional. It does not follow, however, that because telephone and telegraph companies are permitted without charge to construct lines along the highways the privilege granted is a gift. The franchise is conditioned not only on the establishment of lines by a telegraph or telephone corporation, but also, by necessary implication, on the continued operation of the system. (4) The grant under section 536 must be construed in favor of the state. (Civ. Code, Sec. 1069). As so construed it must be held to be a grant to use public roads and highways so long as telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to furnish proper and adequate communication service to the public. Obviously, the state receives a substantial benefit from the continued operation of such a system, and the question is whether,

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notwithstanding that benefit, the grant comes within the constitutional prohibition.

(5) Section 536 has been judicially construed by many decisions of this court, and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration, and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature. (*Western Union Tel. Co. v. City of Visalia*, 149 Cal. 744 (87 P. 1023); *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106 (116 P. 557); *Western Union Tel. Co. v. County of Los Angeles*, 160 Cal. 124 (116 P. 564); *Postal-Telegraph Cable Co. v. County of Los Angeles*, 160 Cal. 129 (166 P. 566); *Postal Telegraph Cable Co. v. Los Angeles*, 164 Cal. 156 (128 P. 19); *Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal.* 265 (118 P. 796); *Postal-Telegraph Cable Co. v. Railroad Com.*, 200 Cal. 463 (254 P. 258); see *People v. Turlock Home Tel. & Tel. Co.*, 200 Cal. 546 (253 P. 1108); *County of Inyo v. Hess*, 53 Cal. App. 415 (200 P. 373); *State of California v. Marin Mun. W. Dist.*, 17 Cal. 2d 699 (111 P. 2d 651).

The nature of the rights and privileges arising from section 536, as interpreted by the cases just cited, is stated in *Postal-Telegraph Cable Co. v. Railroad Com.*, 200 Cal. 463, at pages 472-473 (254 P. 258) as follows: "This section (536) constitutes a grant of a franchise

which the state offered, and petitioner accepted by the construction of its lines. The rights acquired by the Telegraph Company, by accepting and availing itself of the provisions of the section, are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision. . . . The finding of the respondent Commission of the physical fact that petitioner was maintaining and operating its lines of telegraph over the roads and highways of the state establishes, as a matter of law and fact, the proposition that it has accepted and owns a state franchise for that purpose, which was offered to it by section 536, *supra*. . . . The grant, resulting from the acceptance of the state offer, constituted a contract between the Telegraph Company and the state, secured by the constitution of the United States against impairment by any state legislation." (See also *City of Beverly Hills v. Los Angeles,* 175 Cal. 311 (165 P. 924).

The prevalence of legislative grants to public utilities of the privileges of using streets and highways is shown by the following statement in *State of California v. Marin Mun. W. District,* 17 Cal. 2d 699, 703 (111 P. 2d 651): "The right obtained by defendant from these sources is a right conferred by the legislature to construct and operate pipe lines along the public highways of the state. Such a grant by the state to a public utility . . . has always been considered a franchise by the courts of this state. The right granted

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to municipal corporations by the statute of 1923 to use the public highways was held a franchise in *Los Angeles v. South Gate,* 108 Cal. App. 398 (291 P. 654). The right granted to public utilities by article XI, section 19 of the . . . Constitution . . . was held a franchise in *San Jose Gas Co. v. January,* 57 Cal. 614. . . . The right granted to telephone and telegraph companies by . . . section 536 (Civ. Code) . . . was held a franchise in *Western Union Tel. Co. v. Hopkins,* 160 Cal. 106 (116 P. 557); *Sunset Tel. & Tel Co. v. Pasadena,* 161 Cal. 265 (118 P. 796), and *Postal-Telegraph Cable Co. v. Los Angeles,* 164 Cal. 156 (128 P. 19). The right granted to irrigation districts by a 1923 statute . . . for power lines was held a franchise in *Winkie v. Turlock Irr. Dist.,* 24 Cal. App. 2d 1 (74 P. 2d 302)."

The courts of other jurisdictions have held that the statutory offer of a franchise when accepted by the construction and operation of a public utility results in a valid contract secured by the federal Constitution against impairment. *(New York Electric Lines Co. v. Empire Subway Co.,* 235 U. S. 179, 193 (35 S. Ct. 72, 59 L. Ed. 184); *City Railway Co. v. Citizens' Street Railroad Co.,* 166 U. S. 557, 567 (17 S. Ct. 653, 41 L. Ed. 1114); *Chicago Gen. Ry. Co. v. City of Chicago,* 176 Ill. 253, 259 (52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959); see *State v. Southwestern Bell Telephone Co.,* 338 Mo. 617 (92 S. W. 2d 612); *Arkansas State H. Com'n. v. Southwestern Bell T. Co.,* 206 Ark. 1099 (178 S. W. 2d 1002).).

The county seeks to avoid the effect of the long line of cases holding that the acceptance of the offer contained in section 536 and similar statutes resulted in a valid contract by asserting that those cases did not take into consideration the constitutional prohibition against gifts of public property and its historical background. It is argued that sections 22 and 31 of article IV of the state Constitution were enacted to prevent the waste of public funds and property by the appropriation of subsidies to railroads and other corporations, and that the privilege of using the highways for telephone lines is, in effect, a subsidy to a corporation operated for private profit. Although none of the opinions of this court construing section 536 discussed the possible effect of sections 22 and 31 of article IV, it would seem unlikely that the many judges and counsel participating in those cases entirely overlooked the legality of the consideration involved, since that was an essential requisite in each case to the holding that the acceptance of the offer of a franchise resulted in a valid contract.

In support of its contention that a public benefit cannot be a valid consideration for the grant of a limited privilege to use the highways for the construction and maintenance of telephone lines, the county relies upon the case of *Higgins v. San Diego Water Co.*, 118 Cal. 524 (45 P. 824, 50 P. 670), asserting that the consideration involved there is identical with that which must be urged to support the contract in the present case. The City of San Diego subleased from

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defendant water company its distributing system for the term of 20 years at a fixed monthly rental, and the company agreed as part of the consideration that it would construct a railroad line. The agreement was held to be invalid on the ground that the charter of San Diego conferred no authority upon the council to expend any portion of the municipal funds in aiding the building of railroads. The court expressly declined to determine whether the contract violated the constitutional prohibition against gifts, and the decisions therefore is not authority here. There is language in the opinion, however, which intimates that some of the evils which the constitutional restriction was designed to prevent were present in the transaction involved in that case.

Courts in other jurisdictions with similar constitutional prohibitions have held in factual situations comparable to that involved in the Higgins case that the general public benefit derived from the construction of a public utility system is insufficient consideration to support direct appropriations of public money, extensions of public credit, or outright grants of property. *Lord v. Denver,* 58 Colo. 1 (143 P. 284, Ann. Cas. 1916C 893, L. R. A. 1915B 306); *Colorado Central R. R. Co v. Lea,* 5 Colo. 192; *Southern Railway Co. v. Hartshorne,* 162 Ala. 491 (50 So. 139); *Stone v. State,* 223 Ala. 426 (136 So. 727).). On the other hand, the only cases which have considered franchises of the character involved here hold that the grants are valid and do not contravene constitutional prohibitions

against gifts. *(State v. Southwestern Bell Telephone Co.,* 338 Mo. 617 (92 S. W. 2d 612); *State v. Union Electric Co. of Missouri* (Mo. App.), 142 S. W. 2d 1099; *Arkansas State H. Com'n. v. Southwestern Bell T. Co.,* 206 Ark. 1099 (176 S. W. 2d 1002).).

There appears to be some basis for the distinction although it has not been pointed out in the cases. (6) A franchise such as is authorized by section 536 is not an absolute grant in fee or an appropriation of money, but is merely a limited right to use the highways and only to the extent necessary for the furnishing of services to the public. Also, the privilege must be exercised "in such manner and at such points as not to incommode the public use of the road or highway." (Civ. Code, Section 536). It is obvious that the right acquired by the company is of less substance than the transfers involved in the cited cases which condemn appropriations of money and grants in fee.

Moreover, the state is assured of a continuing benefit in return for the privileges granted under section 536, whereas this may not be true in transactions involving an outright appropriation or transfer in fee. The company must not only construct a telephone system but it must render service, and if it fails to do so the franchise terminates. Thus the state receives benefits during the life of the franchise, since in order to retain it the company must continue to serve the public. If and when the public benefit ceases and the franchise expires, the state is in as good a position

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as it was before the limited privilege was granted. The building of a public utility and the consequent benefit to the people may not be a sufficient consideration to support a grant in fee, but it does not follow that the benefit received from the construction and continued operation of a telephone system is not an adequate return for the use of the highways so long as the public service continues.

(7) Since the offer of a franchise in section 536, when accepted, results in a binding agreement supported by a valid consideration, there is no gift within the meaning of the constitutional prohibition.

(8) It is further urged that section 536, insofar as it applies only to corporations and not to individuals, improperly grants special privileges and invalidly discriminates in favor of corporations. It is asserted that the section violates the equal protection clause of the 14th Amendment to the federal Constitution, and also that it is invalid under article I, sections 11 and 21, and article IV, section 25, subdivisions 19 and 33 of the state Constitution.

These provisions of the state and federal Constitutions do not prevent classification by the Legislature, nor do they require that statutes operate uniformly with respect to persons or things which are in fact different. (*People v. Western Fruit Growers*, 22 Cal. 2d 494 (140 P. 2d 13); *McCreery v. McColgan*, 17 Cal. 2d 555 (110 P. 2d 1051, 133 A. L. R. 800); *In re Fuller*, 15 Cal. 2d 425 '102 P. 2d 321); *Bueneman*

v. City of Santa Barbara, 8 Cal. 2d 405 (65 P. 2d 884, 109 A. L. R. 895); *Tigner v. Texas,* 310 U. S. 141 (60 S. Ct. 879, 84 L. Ed. 1124); *Puget Sound Co. v. Seattle,* 291 U. S. 619 (54 S. Ct. 542, 78 L. Ed. 1025); *Radice v. New York,* 264 U. S. 292 (44 S. Ct. 325, 68 L. Ed. 690); *Arkansas Nat. Gas Co. v. Railroad Com.,* 261 U. S. 379 (43 St. Ct. 387, 67 L. Ed. 705).).

The problem presented by the difference in treatment accorded corporations and individuals under section 536 was directly passed upon in *Western Union Tel. Co. v. Hopkins,* 160 Cal. 106 (116 P. 557), and *Postal Tel. Cable Co. v. Los Angeles,* 160 Cal. 129 (116 P. 566), where the claim was made that section 536 was invalid because the offer of a franchise contained therein was limited to corporations. In the Hopkins case the court, in holding that there was no violation of the constitutional provisions relating to special legislation, said (p. 122): "We may reasonably assume that good and sufficient reasons may be apparent to the legislature why the right to exclusively occupy portions of the public highways for the purposes specified should be confined to corporations organized and existing for the purpose of doing a telegraph business, and why such corporations constitute a class to which such a grant may properly be restricted without violating our constitutional provisions against special legislation. If it may reasonably be so assumed the legislation must be upheld, for it is well settled that to warrant a court in adjudging legislation void on this ground it must clearly appear that there was no suf-

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ficient reason to warrant the legislative department in finding a difference and making the discrimination. Every presumption is in favor of the validity of an act of the legislature, until its invalidity is made to appear."

Although the Hopkins case makes no specific reference to the equal protection clause of the 14th Amendment, it is clear that the test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal Constitution. *(People v. Western Fruit Growers,* 22 Cal. 2d 494, 506 (140 P. 2d 13); see *McCreery v. McColgan,* 17 Cal. 2d 555 (110 P. 2d 1051, 133 A. L. R. 800); *In re Fuller,* 15 Cal. 2d 425 '102 P. 2d. 321); *Bueneman v. City of Santa Barbara,* 8 Cal. 2d 405 (65 P. 2d 884, 109 A. L. R. 895).) In the Western Fruit Growers case the court, after noting the general rules on this subject, stated: "Problems of classification under the California Constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary,'

or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. (Citations.) When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." (22 Cal. 2d 494, 506).

It is argued, however, that the portion of the opinion in the Hopkins case dealing with the assertedly invalid distinction between individuals and corporations was dictum for the reason that the telegraph company had commenced business and acquired rights under the Constitution of 1849, which contained no inhibition against special legislation. However, in the companion case of *Postal Tel. Cable Co. v. Los Angeles,* 160 Cal. 129 (116 P. 566), decided at the same time and controlled by the Hopkins decision, the plaintiff company did not commence business or acquire any rights until after the adoption of the Constitution of 1879, and therefore the issue was necessarily before court.

The reasons which may have motivated the enactment of section 536 were not discussed in the Hopkins case, but it must be presumed that the Legislature acted in response to a reasonable basis for classification and that the differentiation was based on adequate grounds if any such basis can reasonably be said to

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exist. There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose.

Statutes similar to section 536, and applying to telephones and telegraphs or to railroads, exist in most of the other states of the Union, but no case has been found in which such a statute was held unconstitutional on the ground of improper discrimination. On the contrary, where the objection has been raised, the power to limit the granting of franchises has been upheld. In *Goddard v. Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066), an act provided that a street railroad corporation might use the streets and highways outside of cities and towns with the consent of the county board, but did not authorize such use by individuals. It was held that the Legislature by limiting grants to incorporated companies did not violate the state or

Federal Constitutions. Other courts have held that banking, insurance and similar businesses may be restricted to corporations. (See *Noble State Bank v. Haskell,* 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112; *Shallenberger v. First State Bank,* 219 U. S 114 (31 S. Ct. 189, 55 L. Ed. 117); *Engel v. O'Malley,* 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128); *Dillingham v. McLaughlin,* 264 U. S. 370, 373 (44 S. Ct. 362, 68 L. Ed. 742); *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, 416 (34 S. Ct. 612, 58 L. Ed. 1011); *Commonwealth v. Vrooman,* 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250); *Brady v. Mattern,* 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291).)

There are general statements in *Frost v. Corporation Com.,* 278 U. S. 515 (40 S. Ct. 235, 73 L. Ed. 483), which, detached from their context, may appear to be out of harmony with the authorities cited above. The case, however, is clearly distinguishable. The legislation condemned in that decision exempted agricultural corporations issuing stock and organized for private gain, as well as true cooperatives, from the requirement of making a showing of public necessity in order to obtain a permit to operate a cotton gin. Individuals and other corporations desiring to engage in the same business for profit were required to make the showing. The corporation involved in the Frost case was an agricultural company issuing stock and organized for private gain. The court intimated that true cooperatives might be properly exempted but held

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that, in view of the subject dealt with by the legislation, there was no substantial or relevant basis for the differentiation between an agricultural corporation of the type there involved and individuals or other corporations organized for profit. The subject involved in the Frost case is entirely different from that dealt with in section 536. As we have seen, there are sound purposes to be served in encouraging the corporate operation of telephone systems, and the classification complained of cannot, therefore, be said to be unreasonable or arbitrary.

(9) The rule that all presumptions are in favor of the validity of statutes and that a classification made by the Legislature will not be overthrown by the courts unless it is palpably unreasonable has added force when, as here, the statute has been accepted as valid for many years, and vast sums have been invested in reliance upon the rights granted. In *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. 726 (258) P. 959), where attack was made on the constitutionality of section 55 of the California Irrigation District Act, the court said (pp. 743-744): "It has been upon the statute books of this state for over forty years. While its constitutionality has never been passed upon by this court, this question, so far as our knowledge goes, has never been raised. It is hardly possible that in all the litigation that has been before the courts of this state regarding irrigation districts in their various ramifications, the validity of this provision of the statute would not have been attached had there been any ques-

tion of its constitutionality. The fact that no proceeding prior to the present one has ever been brought before this or any of the appellate courts of this state in which the constitutionality of this provision of the statute has been questioned is most convincing proof that the profession as a whole has regarded its validity unassailable."

Stronger and even more convincing proof may be found in the legal history of section 536. Its provisions relating to telegraph companies have been in existence since 1872, and those applying to telephone companies have been in effect since 1905. The constitutionality of the section has been impliedly upheld by many decisions of this court, and in the few instances where a direct challenge has been made it has withstood the attack. These decisions have been acquiesced in and acted upon for more than 40 years and have become something akin to a rule of property which should not be disturbed in the absence of the most compelling and cogent reasons. We find no such reasons here.

The judgment is affirmed.

Shenk, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Edmonds, J., concurred in the judgment.

CARTER, J.—I dissent.

By permitting section 536 of the Civil Code and the Broughton Act to stand side by side, the majority opinion in effect affirms the holding in *Inyo v. Hess*,

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53 Cal. App. 415 (200 P. 373), that the two statutes have the effect of giving to telephone and telegraph corporations the right to erect and maintain lines along public highways and streets free of any burden whatsoever while every other person or association must comply with a number of regulations and pay money for the same right. Thus the majority perpetuates the type of special privilege conferred upon corporations which is reminiscent of the decade when this legislation was adopted.

In my opinion, this results in a violation of the equal protection clause of the Fourteenth Amendment to the federal Constitution. While it is clear that the equal protection clause does not prevent a state Legislature from enacting statutes which contain a "reasonable classification," it is equally clear that it does prevent the states from enacting laws which create unreasonable discrimination. The majority opinion asserts that the differentiation here involved is a "reasonable classification." To support this argument, eight cases are cited. (*Goddard v. Chicago & N. W. Ry. Co.*, 202 Ill. 362 (66 N. E. 1066); *Noble State Bank v. Haskell*, 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed. 112); *Shallenberger v. First State Bank*, 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117); *Engel v. O'Malley*, 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128); *Dillingham v. McLaughlin*, 264 U. S. 370 (44 S. Ct. 362, 68 L. Ed. 742); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (34 S. Ct. 612, 58 L. Ed. 1011); *Commonwealth v. Vrooman*, 164 Pa.

306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250); *Brady v. Mattern,* 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291).)

All eight of these cases involved statutes making distinctions between classes of the public. In all eight of the cases, the statutes were upheld as not violative of the Constitution. But the basis of the holdings in seven of the eight cases was that the statutes constituted an exercise of the police power, so-called. This power of the states to make regulations which, while they abridge the rights of some of the citizens, are nevertheless necessary and justified in the interest of the general public, can be invoked only in cases where there is a danger to the general public. A classification may be validly made when it has a reasonable tendency to combat a specific evil. ". . . (t)o justify the imposition of a burden, there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved." (Freund, Police Power, 635.) This element of public danger was present in seven of the cases mentioned. In *Nobel State Bank v. Haskell,* 219 U. S. 104 (31 S. Ct. 186, 55 L. Ed 112), the issue was whether anyone desiring to engage in the business of banking could be required to form a corporation, submit to certain inspections and contribute to an insurance or guaranty fund. The evil which this regulation was designed to check was the frequent failure of individuals engaged in the bank-

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ing business to meet their obligations, and the resulting insecurity of commercial paper, especially checks. The Supreme Court of the United States said: "If the . . . legislature declares . . . that incorporation, inspection and the above-described cooperation are *necessary safeguards,* this court certainly cannot say that it is wrong." *(Nobel State Bank v. Haskell, supra.)* (Emphasis added.) *Shallenberger v. First State Bank,* 219 U. S. 114 (31 S. Ct. 189, 55 L. Ed. 117), involved practically the same situation and is based on the same reasons as the Nobel State Bank Case. *Engel v. O'Malley,* 219 U. S. 128 (31 S. Ct. 190, 55 L. Ed. 128), and *Dillingham v. McLaughlin,* 264 U. S. 370 (44 S. Ct. 362, 68 L. Ed. 742), both involved control of a type of business apparently common to New York during the years of heavy immigration. There, individuals would act as depositaries of small savings deposits made by recent immigrants. A substantial number of these depositaries seems to have absconded with the money so deposited and, of course, the low-income, unsophisticated depositors were nearly helpless. To eliminate this danger and still enable this particular group of depositors to make their small deposits, various statutory enactments were passed which subjected these individual depositaries to rather strict regulations but exempted from the operation of the regulations banks duly incorporated. Failure on the part of the depositaries to comply with the regulations, such as putting up a bond and submitting to inspections, was made a misdemeanor. Statutes of this type were therefore

obviously designed to check an evil and if any further test be needed, the criminal character of the statute is the best indication that the protection of the public was at its basis. In *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389 (34 S. Ct. 612, 58 L. Ed. 1011), a statute imposing a number of regulations on insurance companies was attached on the ground that it expressly exempted farmers' cooperative insurance associations from its regulations. The provisions of the statute were regulatory only and it was held that the classification was entirely reasonable because the members of a cooperative farmers' insurance association are in a far better position to police their own organization than members of the public who deal with unincorporated and unregulated insurers.

The next two cases cited are not binding on this court because they were decided by state courts. But they are equally based on the principle of protection of the public so that they are not only not binding but also inapplicable. *Commonwealth v. Vrooman,* 164 Pa. 306 (30 A. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250), was a criminal prosecution under a statute making it a misdemeanor for any person other than a corporation to engage in the insurance business. The decision upholding the distinction is based on the police power and the need of the public for protection. *Brady v. Mattern,* 125 Iowa 158 (100 N. W. 358, 106 Am. St. Rep. 291), was a petition for a writ of habeas corpus by a contractor who had been arrested after violating a statute which placed rather stringent controls on in-

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dividual contractors and required them to put up bonds but exempted corporate contractors and building and loan associations from such controls. The petitioner attached the constitutionality of the discrimination and the court based its refusal to grant the writ on the fact that the protection necessary to safeguard the public made the classification reasonable.

In the case at bar, there is no pretence that the discrimination is in any way designed to protect the general public from the risks involved if it is permitted to deal with unincorporated telephone and telegraph operators. The absence of this element renders section 536 of the Civil Code unconstitutional. It makes a distinction between private persons and partnerships on one side and telephone and telegraph corporations on the other. This distinction would result in a reasonable classification if public welfare were at all involved. Since public welfare is not involved, the distinction results in a discrimination prohibited by the equal protection clause of the Fourteenth Amendment.

The one case cited in the majority opinion which has not been dealt with does seem to state the rule that the policies behind legislation are not open to inquiry by the courts. *Goddard v. Chicago & N. W. Ry. Co.,* 202 Ill. 362 (66 N. E. 1066). In that case the argument was made that legislation which permitted a county board to issue permits for the construction of railroads to corporations only was in violation of the state and federal Constitutions. The court brushed

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this argument aside, saying: "The legislature had power to limit the authority of the county board to grant a license to incorporated companies created . . . for the purpose of constructing and operating street railways, and it is not material what reasons existed for prescribing the limit. It was a case for the exercise of legislative judgment with which we are not concerned. *(Goddard v. Chicago & N. W. Ry. Co., supra.)* It is submitted that the court was clearly wrong in stating this flat rule. The moment a classification or discrimination is created, the question of whether it shall stand or fall is very much the concern of the courts. It is simply not true that the Legislature can exercise unlimited discretion when it creates such classifications. The majority opinion recognizes this and correctly states the rule that discriminatory legislation must fall unless reasonable and non-arbitrary. The Goddard case, in failing to recognize this rule, would therefore fall even under the view taken by the majority. Besides, being a state case it is not binding here and its persuasive force is dissipated by the case of *Frost v. Corporation Com.,* 278 U. S. 515 (49 S. Ct. 235, 73 L. Ed. 483), which controls the Goddard case as well as the case at bar.

The Frost case, supra, shows that the result reached by the majority is wrong. The distinction created by section 536, the Broughton Act and the decision in this case is not a reasonable classification: It is an unreasonable discrimination. The present case falls clearly within the rule of the Frost case as it is much

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stronger on the facts. In the Frost case, a statute required persons and nonagricultural corporations who wished to engage in the ginning of cotton to make a showing of public necessity as a condition precedent to their being able to obtain a license. Cooperative associations were exempt from this requirement. Under the general laws of the state involved, a cooperative association was free to sell its services to the public and make a profit out of such dealings. The court held that the distinction created an unreasonable classification. "... the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, . . . it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation." *(Frost v. Corporation Com., supra,* 522.)

In the case at bar, mere enumeration of some of the requirements set forth in the Broughton Act will show that a greater burden results in this case than that of showing a public necessity in the Frost case. Under the Broughton Act, a bidder for a franchise must—unless he is a telephone or telegraph corporation—submit sealed bids, must make immediate payment of a substantial sum if the franchise is struck off

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to him at the auction, must make an additional large payment within 24 hours, and must pay a tax of 2 per cent on the gross receipts every year. There are other provisions, but those set forth show sufficiently the great disparity created between the privileges enjoyed by corporations under section 536 and those enjoyed by individuals and associations under the Broughton Act.

The classification is unreasonable and discriminatory because nothing is gained through it by anyone including the state, except the corporations which are exempt from the burdens of the Broughton Act. Operators other than those favored few are evidently just as acceptable to the Legislature, provided they pay for the privilege given free to those favored few. Just as in *Frost v. Corporation Com., supra,* both are engaged in exactly the same type of business, for the same purpose. Both would be public utilities. It is obvious, therefore, that no consideration of public welfare could have been in the back of the legislators' minds. No real reason for the classification is shown. The majority opinion indulges in conjecture as to what some of these reasons might have been. That, however, is not a proper solution. The Supreme Court of the United States has laid down the rule that the reasons for the classification must be apparent in order for it to have any chance of being sustained: "To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only on surmise, with

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nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose." *(Colgate v. Harvey,* 296 U. S. 404, 425 (56 S. Ct. 252, 80 L. Ed. 299, 102 A. L. R. 54).) The last-cited case involved income tax legislation under which income from investments within the state was favored over that derived from out-of-state investments. The state courts held that such a statute "might" have the purpose of encouraging investments within the state. The Supreme Court answered that contention in the words quoted *supra.* The suppositions made by the majority opinion in the case at bar are open to the same criticism.

Two more points are raised which purportedly lend support to the holding of the majority: One, that the question of constitutionality of these statutes has been before this court and has been decided and that therefore the classification and the subsequent reliance thereon became tantamount to a rule of property which this court should not disturb except for compelling reasons. Literally speaking, the statement that the constitutionality of the combined effect of these statutes has been before this court is true. The statement, however, contains an ambiguous term: "Constitutionality." If this word can be construed to include the state Constitution alone, the statement would be correct. *Western Union Tel. Co. v. Hopkins* and its companion cases, 160 Cal. 106 ff. (116 P. 557), did pass on the question whether the California Constitution was violated. But the court expressly recognized

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that nothing more than one single section of the California Constitution had been raised by counsel. The court found that that section had not been violated (art. I, sec. 11), and discussed one other aspect of the case under the California Constitution. The federal Constitution was not mentioned. How a holding of this kind can result in a "rule of property" is very difficult to conceive. The federal question is before this court for the first time in this case. There is no reason why it should not be squarely met.

The other contention is that no "compelling and cogent reasons" exist in this case for a change of the status of telephone and telegraph corporations under what they conceived the law to be. I believe that such reasons do exist. Under the majority holding the counties will receive no revenue out of franchises operated by telephone or telegraph corporations. In order to meet the requirements of the various budgets involved, the tax rate in those counties is therefore correspondingly higher than it would be if these corporations were subjected to the same duty to pay now resting on the balance of the operators. By subjecting telephone and telegraph corporations to the terms of the Broughton Act and by requiring them to make the payments called for by the act, the revenue of the counties will increase and the tax rate will decrease correspondingly. The result will be a higher operating cost for telephone and telegraph corporations. But, contrary to the contention made by these corporations, this will not have any "disastrous effects" on them. They are given the

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means of obtaining permission to charge higher rates (Stats. 1915, p. 115 as amended, 2 Deering's Gen. Laws, Act 6386, Sec. 61 ff.) and will not, as they seem to contend, be driven into bankruptcy. The higher rates which telephone and telegraph corporations may then charge for their services will place the burden of paying for the use of public streets and highways where it belongs: On the subscribers to telephone and telegraph services rather than the taxpayers at large. That, in my opinion, is a reason sufficiently cogent and compelling to make a change, even if a settled situation had existed up to now. Mere lapse of time will never breathe the breath of life into a statute void for unconstitutionality, and the attempt to uphold the statute on this ground evinces a fatal weakness in the basic concept upon which the majority opinion is predicated.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States has been given renewed vigor by several recent decisions of the Supreme Court of the United States, and in view of this trend I do not anticipate that that court will depart from its pronouncement in the Frost case which is in clear conflict with the holding of the majority in the case at bar.

It is, therefore, my opinion that the judgment should be reversed.

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